IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9931 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AVNISH @ RINKU YOGESHKUMAR JAYSWAL

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 9931 of 2002

MR HR PRAJAPATI for Petitioner No. 1

MR MR PRAJAPATI for Petitioner No. 1

MR V B SHETH AGP for Respondent Nos.1-3

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 17/04/2003

ORAL JUDGEMENT

1. Heard the learned counsel for the petitioner Mr

H.R.Prajapati for the petitioner and learned AGP Ms Nandini Joshi for the State. The affidavit tendered by her of Mr K.R.Kaushik, Commissioner of Police of Ahmedabad, is taken on record.

2 By this petition under Article 226 of the Constitution of India, the petitioner - detenu has challenged the legality and validity of the order of detention dated 7.9.2002 passed against him by the Commissioner of Police, City of Ahmedabad, in exercise of the powers conferred on him by Section 3(2) of The Gujarat Prevention of Anti-Social Activities Act, 1985 (hereinafter referred to as the PASA Act) the petitioner-detenu.

3. The detenu has been served with the grounds for detention along with the order of detention on 7th September 2002, which indicate that the petitioner is a bootlegger. The detaining authority, that is, Police Commissioner, City of Ahmedabad, while recording the subject satisfaction for passing the order of detention, has considered mainly registration of two different offences punishable under Bombay Prohibition Act. In both these offences, three persons have been found involved and they are named in the FIR as accused persons and I am told two of them are detained under PASA. The first offence came to be registered on 30th August 2002 and the second offence was registered on 4th September 2002. In the first event 135 bottles of Indian Made Foreign Liquor was found along with Rs.1,130. The date of arrest is relevant. Technically, police arrested the petitioner on 6th September 2002 i.e. after the arrest in the second offence allegedly committed on 4.9.2002. It is submitted by Mr Prajapati that because of the arrest on 4th September 2002 he has been implicated in the alleged offence of 30th August 2002.

4. The petitioner has challenged the legality and validity of the order of detention on various grounds. However, he has concentrated his argument mainly on two grounds. It is submitted that firstly the order passed by the detaining authority is passed mechanically and without application of mind. In first offence he was arrested for the first time on 6.9.2002. On that date statement of petitioner was recorded and the statement recorded by the sponsoring machinery till 6.9.2002 has been considered by the detaining authority along with the statements recorded of two unnamed witnesses on 5.9.2002. Statements of both these two unnamed witnesses have been verified by the detaining authority on 6.9.2002 and the order of detention was passed on 7.9.2002. It is argued

that it is a case of undue haste and the subjective satisfaction recorded by the authority can be said to be mechanical exercise of powers. In support of this submission, Mr Prajapati has placed on the decision of this Court in the case of RANUBHAI BHIKHABHAI BHARWAD (VEKARIA) V. STATE OF GUJARAT & ORS. [2000 (3) GLR 2696]. It would be appropriate to quote the relevant part of para 9 of the said decision. In this para the learned Single Judge after referring to the relevant dates of the proposal made and the date of verification of the statements of the witnesses has observed as under:-

"Merely because in the facts before the Division Bench the proposal itself was made on 16th October, 1992 and the order was passed on 17th October, 1992 and in this case the proposal was made on 27th August, 1999, the verification of the statements were made on 29th August, 1999 would not make any difference. Such a difference of a day or two here and there is hardly sufficient to inspire confidence that the detaining authority had the sufficient time for the purpose of verification of the facts which are necessary to lead to invoking the privilege under Sec.9(2) of the Act. In this case also the manner in which the verification has been recorded of the statements made by these three witnesses for the purpose of Sec.9(2) shows that the same has been done only as an empty formality and the detaining authority had recorded that whatever the statements made by the witnesses were correct. Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an active application of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts as had been disclosed by the witnesses so as to express the fear and to invoke the privilege under Sec.9 (2) against the disclosure of the names and addresses of the witnesses and it thus appears on the basis of the ratio of the decision of the Division Bench that it is a case of wrong exercise of power under Sec. 9 (2) adversely affects the detenu's right of making an effective representation guaranteed under Art. 22(5) of the Constitution of India. This Court quite appreciates in such cases the predicament or the dilemma of the detaining authority inasmuch as, when the action is taken promptly, it is argued that the action has been

> taken in a hot haste and if the same is taken after lapse of some time, it is said that the action is delayed, and therefore, the same stands vitiated. In order to combat this argument, the Division Bench has rightly observed that a balance has to be struck in such cases between the public interest and the right of the detenu to make an effective representation. The detaining authority is, therefore, required to act in such a manner that this balance is maintained. Once the materials are placed before the detaining authority with the proposal by the sponsoring authority, it must have reasonably sufficient time for the purpose of verification of the facts and the consideration of the entire material with an active application of mind and the order has to be passed at the earliest opportunity, but in this process to strike the balance between the public interest and the right of the detenu either of the two should not be defeated in any manner and the whole process must indicate that the detaining authority had applied its mind with the requisite approach and it had also devoted sufficient time before arriving at the decision to claim the privilege under Sec.9 (2) of the Act and also to come to the conclusion that the detenu was required to be detained immediately. In the facts of the present case, I find that this requirement of maintaining the balance has been defeated and the detention order has been passed on 30th August 1999, i.e., on the next day to the date on which the materials were considered by the detaining authority. In this regard, learned Counsel for the petitioner had made a reference to several unreported decisions of this Court rendered in different cases on different dates, but I find that it is not necessary for me to deal with all those unreported decisions insofar as this point is concerned, the matter stands fully covered by the Division Bench decision to which the reference has been made hereinabove."

5 Therefore, the learned counsel for the petitioner submits that the subjective satisfaction recorded by the authority is nothing but mechanical exercise of the power and hence the order is not sustainable. The second point argued by Mr Prajapati is that even for the sake of argument it is accepted that the petitioner was involved in two different offences punishable under the Bombay Prohibition Act, that involvement itself would not go to

the root of the maintenance of public order and at the most it can be said to be breach of law and order and a breach of a particular law. The age of the detenu also should be considered as relevant in reference to the gravity of the offence allegedly committed by the detenu, the quantum of punishment prescribed, whether the offence is heinous or otherwise, goes to the root of the maintenance of public tranquility. For short, I am not convinced that the activity of the petitioner was prejudicial to the maintenance of public order and therefore on this ground also the order of detention is not found sustainable.

6 I do not think it necessary to deal with the other contentions and grounds raised by the petitioner and the petition can be allowed.

7 For the reasons aforesaid, this petition is allowed. Impugned order of detention dated 7.9.2002 passed by the Commissioner of Police, Ahmedabad City, is hereby quashed and set aside and detenu is hereby ordered to be set at liberty forthwith if he is not required to be detained in any other case. Rule is made absolute.

Direct Service is permitted.

[C.K. BUCH, J]

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